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NO. 2739

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United States  
Circuit Court of Appeals

For the Ninth Circuit

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OREGON-WASHINGTON RAILROAD & NAVI-  
GATION COMPANY, a Corporation,  
*Plaintiff in Error.*

—VS.—

ESTHER ROMI PENSO and BENSOIR PENSO,  
by his Guardian *Ad Litem* LEON BENEZRA,  
*Defendants in Error.*

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Brief of Defendants in Error

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Morgan & Brewer,  
Hoquiam, Wash.

A. Emerson Cross,  
Aberdeen, Wash.  
*Attorneys for Defendants in Error.*

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I.

STATEMENT OF THE CASE.

There are portions of the statement made by counsel for appellant which are incorrect and certain omitted statements of fact which we shall make.

The deceased and the witness, Theo. Balabanas, had worked together at the Coates Shingle Company, for more than a year. They crossed the railroad

bridge every night. On the night of the accident they left the mill at fifteen minutes to six. They were on the bridge at six o'clock. They had never before met a train while crossing the bridge. It was raining hard, was windy and dark (R. p. 49). The night was very dark and it was raining and it was windy, and blowing strong (R. p. 52).

The witness, Balabanas, and the decedent, had almost reached the west end of the bridge. Penso was within twenty-four feet of the west end of the bridge on the up-river side (R. p. 38). Counsel for the plaintiff in error has fallen into the curious error that the decedent was about half way across the bridge, at the time the witness Balabanas saw the light of the car. All the witnesses agreed that at this time the decedent was close to the west end of the bridge.

Witness, Balabanas, saw the light of the car. He went over and dropped onto an iron post on the bridge. This post was the up-right post nearest the west end of the bridge near the up-river side and was about twenty-four feet from the end of the bridge. After the witness saw the light of the car and had moved to the post, he put his arm around it. Witness had walked four or five feet (steps) after

he saw the car coming (R. p. 39). The decedant was between him and the end of the bridge, showing that at the time the light of the car was first seen by the decedant and the witness Balabanas they were very close to the westerly end of the bridge.

Witness Lucky, corroborates this. He got down on the side of the bridge, twenty-five feet west of the center. He saw (a man) ahead of him. Balabanas and the decedant were certainly between that point and the westerly end of the bridge.

The witness, Hendricks, also corroborates this. He states that just as soon as the engine entered the straight track it showed on the bridge. It was two hundred and ninety or three hundred feet from the curve to the bridge. He stated that on the evening of the accident the witness could see the full length of the bridge when he got around the straight part of the track. That he could see from the curve along the straight stretch of track, 290 feet to the bridge. That he could *see* clear through the bridge. (R. p. 53.54). He was looking to observe if anyone was on the bridge (R. p. 54). When he first saw the decedant, he was distant about three hundred feet; he was in the center of the track.

When the decedant had passed beyond the last upright, the defendant's gas car, approaching from the west, came in view. As it rounded the reverse curve near the end of the bridge its light was thrown upon th bridge and was discovered by witness Balabanas and presumably by decedant. The gas car was not equipped with a standard head-light, such as is used on steam locomotives (R. p. 51). It was equipped with an air whistle (R. p. 52). The head-light of the gas car was located down over the cow-catcher. (Defendant's Exhibit "G"). (R. p. 51).

The gas car could be operated at a very high rate of speed. It is different from the operation of a steam train in that it picks up and gathers speed very quickly and could be stopped much more quickly than the ordinary train (R. p. 50).

The motorman in charge had been operating this gas car for ten days (R. p. 50). At a rate of six miles per hour the car could be stopped in ten feet (R. p. 69). When the motorman, Rendricks, rounded the curve, three hundred feet away, he discovered decedant o nthe track (R. p. 48). He made no effort to stop the car. (He stated he assumed the man would get away) (R. p. 55). When the man tried to make his get-away or something like that he was about twenty-five feet from the end. There was no

place where the decedant could have reached the place of safety except the platform at the end of the bridge (R. p. 39-40).

The decedant had one foot on the rail, and one on the platform. There was no other place of safety, except that toward which he was running. At this point he was struck by the car and knocked into the river. *The car ran thirty-eight feet, half its length, after striking him.* The car was seventy-six feet long (R. p. 68). The middle of the car was stopped opposite the place where the decedant was struck (R. p. 69). Half the car was on the bridge (R. p. 55).

The motorman knew that a great many people were accustomed to pass back and forth across the bridge (R. p. 54). That he had seen more than a dozen at one time, (R. p. 56). Some of them would step down into the clear, some would be on the platform. Others would hang onto the steps. (R. p. 56). That people were seen there every once in a while. (R. p. 49). That he never saw any other men on the bridge that night until after he stopped the car and got out in front, then there was a great number (R. p. 55).

The bridge in question belongs to the Northern Pacific Railway Company. For many years it has

been used by foot passengers at this hour of the day. It was regularly turned for their accommodation. At one time a charge had been made to foot passengers but this had been discontinued (R. p. 36). Hundreds of people were accustomed to pass over this bridge every day, men and women. Stairs and platforms had been arranged for their accommodation (R. p. 26, 27, 28, 29 and 30).

John G. Girard, for plaintiffs, testified that he crossed the bridge twice a day for nearly ten years and observed others crossing the same bridge; that employees used to cross the bridge in the morning and when returning home. The employees of the plants on the east side habitually crossed the bridge. He testified he had seen about one hundred people preparing to cross the bridge at one time; that the bridge had been generally used for the purpose of travel during the last ten years (R. p. 25). While the main part of town was on the west side of the river, there were lots of people living on the east side of the river (R. p. 26).

E. C. Taylor, one of the operators of the motor car, on behalf of defendant, testified that he knew that persons were in the habit of crossing the bridge in the night time; that he had seen people crossing there when the car was going through. That gen-

erally when the car crossed the bridge during the evening there would be people crossing or about to cross the bridge; that he knew that men after leaving their work were in the habit of using the bridge for the purpose of going to the other side of the river where they lived (R. p. 68).

William Anderson, conductor on the car in question, for defendant, testified that he had crossed over the bridge before when people were on the bridge many times; that he knew that employees on the east side of the river were in the habit of crossing over the bridge in going to and from their work (R. p. 65).

J. W. Dunn, on behalf of the defendant, testified that he met the motor car on the bridge on one occasion, while he was crossing; that he had seen other people crossing the bridge when the motor car was crossing; that during the two months he had seen many people getting out of the way of the car crossing the bridge; that a man would be out of danger if he could get down on a plate, or stand on the end of the ties and lean against the up-right piece; that he would be in no danger of being hit by the car (R. p. 70-71).

A. L. Gabriel, on behalf of defendant, testified that he used to cross the bridge; that when he would

meet the car he would step to one side and wait for it to get by; that he would get down below the ties if met the car in the center of the bridge; that any time when he was not in the center of the bridge, he could get out of the way of the car; that persons crossing the bridge at the same time this motor car was crossing could get out of the way of the car and be in a place of safety.

He stated they could do this either by leaning up against the up-rights or getting down on the testle below; that he had seen men crossing the bridge about six o'clock in the evening meet the car; that these men would do likewise. He had seen a good many people meet the trains while they were on the bridge; that he never knew of any one being hurt (R. p. 72).

Mr. Gabriel also testified that if a person met the car while crossing the bridge and either got down or should stand with his feet on the outer edge of the ties and lean up against the bridge work, he would be out of danger there also; that there were several plates upon which men could stand on each side of the bridge, but he did not know how many (R. p. 72-73).

Thos. Steier, on behalf of defendant, testified that he was in the habit of crossing this railroad bridge, using the bridge about once a day; that he

worked at the National mill from 1906 to 1911, and then went to work at the Eureka mill and had been working there ever since. Both mills are on the east side of the bridge. He crossed it in the morning about half past six and in the evening about five or ten minutes to six. He met the motor car a number of times on the bridge.

When he met the car he would hold himself to the iron bars. If one met the motor car while he was on the bridge, he could get into a place of safety by stepping on the ties first and then he could step down to the trestle and be safe between the iron bars. That he would be safe if he got his feet on the outer edge of the ties and leaned up against the frame work. He had seen quite a few people understaking to cross the bridge at the same time the car was crossing. These people, to get out of danger, would do the same thing, step to one side of the ties or down to the trestle of the bridge. He never knew of any person during all these years who had been crossing there, being hurt (R. p. 74).

Christ Zurbas, a witness for plaintiff, testified that he was on the bridge the night Penso was killed. He had been working at the National mill. He had crossed the bridge every night for four months. There were other persons on the bridge at that time. There

were from fifteen to twenty-five. He could not tell the actual number. Many men from the other mills were in the habit of crossing the bridge after they had quit work at night (R. p. 42).

According to the testimony of Balabanas, who was twenty-five feet from the point of the accident, no whistle was blown and no bell was rung (R. p. 38-39).

## II.

### MOTION FOR NON-SUIT.

In the State of Washington a motion for non-suit is waived by introducing evidence on behalf of defendant. Error can not be predicated upon a denial of a motion for non-suit in this State unless defendant stands upon its motion.

See:

*Parker v. Washington Tug & Barge Co.*, 85 Wash. 575-580;  
*Alkire v. Myers Lbr. Co.*, 57 Wash. 300;  
*Ryan v. Lambert et al*, 49 Wash. 649;  
*Adams v. Peterman Mfg. Co.*, 47 Wash. 484-486.

The District Court will follow the State court's practice.

See:

*Coughran v. Bigelow*, 164 U. S. 301-311;  
 41 L. Ed. 446;

*Central Transportation Co. v. Pullman Palace  
Car Co.*, 139 U. S. 24-61;  
35 L. Ed. 61.

This disposes of the motion for non-suit.

### III.

## MOTION FOR DIRECTED VERDICT.

The motion for directed verdict was properly denied. In considering a motion for directed verdict, the court will, of course, consider all the evidence both for plaintiff and defendant. A verdict will not be directed where the conclusion does not follow as a matter of law that no recovery can be had upon any view which can be properly taken of the facts, that the evidence tends to establish.

See:

*Dunlap v. Northeastern Ry. Co.*, 130 U. S.  
649;  
32 L. Ed. 1058;  
*Texas & P. R. Co. v. Cox*, 145 U. S. 593;  
36 L. Ed. 829.

If reasonable minds might reach different conclusion upon the facts shown, the case should be submitted to the jury..

## IV.

**NEGLIGENCE OF THE DEFENDANT.**

We shall consider, firstly, the question as to whether there was sufficient evidence of the defendant's negligence, and secondly, whether the question of contributory negligence was properly submitted to the jury.

Counsel seem unable to find any testimony in the record which even tends to show that the defendant was guilty of any neglect causing Penso's death.

It was the duty of the person operating this motor car to keep a reasonable look-out for persons upon this bridge, and to use reasonable care to prevent injury to any one upon the bridge who might be crossing it as the car was being operated across the bridge. It was the duty of the person operating the motor car, if he discovered any one upon the bridge in apparent danger of injury, to use reasonable care to avoid injuring such person. It was the duty of the person operating such motor car to operate such car at such rate of speed in approaching such bridge, that he could, in the exercise of ordinary care, prevent injury to any person thereon. It was also his duty as he approached such bridge to give proper warnings of the approach of such motor car to the

persons on such bridge that the motor car was approaching.

The court instructed the jury, which was not excepted to, as follows:

“Where the operators of a car have reason to anticipate that there may be pedestrians on the track, it is their duty to use reasonable diligence and reasonable and ordinary care to give warning of the approach of their car so that those pedestrians whom they have reason to anticipate are on the track may have reasonable opportunity to get out of the way, and if they fail to use ordinary care in the speed at which they operate the car, or the warnings which they give, or the lookout which they keep to advise those whom they may have reason to believe are using the way as a foot-path, for them to get out of the way, they would be negligent.” (R. p. 82).

The court also instructed the jury concerning the duty of the defendant, as follows:

“It is as much the duty of the pedestrian traveling along a highway or any place used as a highway to use his sight and hearing, as it is for the engineer of an approaching train to keep a lookout for danger, and if the engineer of the car saw the plaintiff walking in the ordinary and customary way upon the track, it was not the duty of the engineer to stop the car on account thereof, but he had the right to assume

that the party walking upon the tracks, as disclosed by the evidence, would himself get out of the way of the approaching train or car, unless there was something in the situation to advise the engineer that it would be unsafe to do so." (R. p. 87-88).

The evidence shows that Penso had passed the last up-right on the west side when the car came around the curve about three hundred feet from the bridge. The car was approaching at such a rate of speed that Penso could not make the west platform, some twenty-five feet away, before the car struck him. If this car was not going at a reckless rate of speed, with the knowledge that all of the persons operating the train had, as their own testimony shows, that persons were likely to be on the bridge, we don't know how much faster a car would have to go to be going at an excessive rate of speed.

Respondents took the humane view of the situation and alleged in their complaint that the motorman did not keep a reasonable lookout for persons on the bridge, although knowing they were likely to be thereon, as he approached the bridge. However, the motorman himself testified that he actually saw Penso, when he was three hundred feet away. It is true he testified that Penso was off to one side and got on to the middle of the bridge in front of the

car too late for him to stop, but the testimony of Balanas, who was with Penso, is that he never got off on one side of the bridge at all, but commenced running toward the west platform.

If the jury believed that Penso did not get off on one side of the bridge, as the motorman testified, but ran along the middle of the bridge toward the platform as Balanas testified, and believed that the motorman saw Penso three hundred feet away, there certainly could be no question of the negligence of the defendant. The jury could believe either one or two things, the motorman did not keep a reasonable lookout, or if he did see Penso, did not use reasonable care in operating the car after he saw him. Under either view, there was sufficient evidence of defendant's negligence to go to the jury.

It is urged that there was no evidence that the bell was not rung or the whistle blown as the motor car approached the bridge. Balabanas testified that he did not hear the bell rung or the whistle blown. It was the duty of Balabanas to use ordinary care as he crossed the bridge in listening for the approach of a train. The cases cited by Appellant are cases where a person testifying was under no legal duty to listen and was not in a position where it could

be said with reasonable certainty that his failure to hear was evidence that the bell was not rung or the whistle blown.

The evidence in this case shows that if the whistle was blown it could have been heard about a quarter of a mile away. In view of the fact that Balabanas owed a duty to listen, his testimony that he did not hear a bell or whistle blown, was evidence of the fact that the bell was not rung or the whistle sounded.

See:

*Franchisa v. Chicago etc. R. Co.*, 195 Fed. 462.

It is urged that whether the whistle was sounded or bell rung was immaterial because the evidence shows that Penso could see the headlight three hundred feet away, as the car rounded the curve. The evidence, however, shows that the car was going so fast that he could not make his only place of safety after he saw the headlight on the car. So that had a bell been rung or the whistle sounded before the car rounded the curve, Penso would have had an opportunity to have gotten to a place of safety before the car struck him.

It was for the jury to say whether the motor-man, in the exercise of ordinary care, with a head-

light showing upon the bridge, affording him a clear view, seeing Penso running for the west platform, should have known that this was his only place of safety, as he had passed the last upright to which Penso could look for safety.

Although the evidence shows that there was defendant's witness, Louis Lucky, (R. p. 59), and plaintiffs' witnesses, Balabanas (R. p. 37), and Christ Zurbas (R. p. 42), and at least fifteen others (R. p. 42) on the bridge at the time of the accident, yet the motorman saw only one person on the bridge, according to his testimony (R. p. 48). This shows he was not keeping a reasonable lookout. The jury could have come to a reasonable conclusion that he did not see Penso. He was operating the car up to the bridge at an excessive rate of speed and without any warning of his approach.

It was his duty to operate the car at a reasonable rate of speed and to give proper warnings under the circumstances necessary to afford reasonable protection to persons on the bridge, is sustained by the following cases:

*Great Northern Ry. Co. v. Thompson*, 199  
Fed. 395.

*Thompson v. Northern Pacific*, 93 Fed. 384.

In any event the court did not err in refusing a directed verdict for the defendant, as the evidence shows that the defendant had the last clear chance to save Penso from injury. The motorman testified he could stop the car in ten feet at the rate of speed he was going. He did not actually stop it within less than about thirty-five feet. He testified he saw Penso three hundred feet away. Balabanas testified that Penso was running towards the west platform and did not get off on to the side of the bridge as the motorman testified.

Under the facts, the jury could have applied the doctrine of the last clear chance had it been submitted to them. The fact that the court did not submit that question to the jury does not affect the question as to the sufficiency of the evidence to entitle plaintiffs to submit the cause to the jury.

## V.

### CONTRIBUTORY NEGLIGENCE.

It is urged deceased was guilty of contributory negligence as a matter of law. It is stated that deceased knew that a train was liable to cross the bridge at almost any moment, and that it is fair to presume deceased knew of the schedule of this motor

car. There is no evidence that deceased knew this. The evidence of Balabanas, who went with him home over that bridge nightly, is that he did not. Neither of them knew anything of any schedule. They had never previously been on the bridge when a train crossed.

Suppose that deceased did know a train was expected any moment. Any one on a railroad track or bridge could in a sense be said to expect a train at any moment. But this does not make the person guilty of contributory negligence. If so, in every case contributory negligence would defeat recovery.

It is said deceased knew there was a platform on the easterly end of the draw span, one in the middle and another on the westerly end, where deceased could stand in perfect safety. Standing on a platform on the east side would not get deceased across the bridge. He had as much right to go from the center platform to the west platform as from the east platform to the center platform.

When the motor car was first seen deceased about twenty-four feet of the west platform. He had passed the only place to step to one side and was running for the west platform. He was just in the act of stepping on to it when he was struck.

Counsel persist in stating that deceased was in the middle of the bridge when struck. This is true in a sense. He was walking between the rails on the planks and tin laid in the middle, but had passed the last plate and upright girder when he saw the car. Balabanas, coming behind Penso stepped on this plate for safety. Penso started running to the west platform. The car was about three hundred feet away. It was going at such speed it beat Penso to the west platform.

The assertion that Penso had half the length of the bridge to go while the car went three hundred feet, is contrary to the evidence. This contention is built upon Balabanas' statement he was in the middle of the bridge when he saw the car. He meant between rails, not half way across the bridge. Balabanas marked post on Plaintiffs' Exhibit 7, which he got hold of, pointing to upright post nearest the west end of the bridge.

It is said deceased negligently and carelessly, in disregard of his safety, undertook to beat the car to the end of the bridge, at a time when he had ample opportunity to have gotten on a platform at the middle of the bridge. The fact is, Balabanas was behind deceased four or five feet from the last upright when he saw the car and deceased was beyond

the last upright. So Balabanas' only place of safety was the upright and Penso's the west platform. This he made for but lost by a small margin.

Counsel think Penso should have turned around and run back. We are to judge the situation, not as we see it now, but as it might occur to Penso then. With a car three hundred feet away, if the car had been operated at a reasonable speed, he would have made it. He could not have made the next upright beyond the one Balabanas seized, for it was farther away than the west platform. Certainly Penso did what then occurred to him best to save himself. That he knew he was in danger is shown because he ran. The most that could be urged would be an error of judgment *in extremis*.

Counsel cite *Texas Midland R. Co. v. Byrd*, (Tex) 115 S. W. 1163, and urge that this bridge was reasonable safe or unsafe for foot passengers; that if there was no way to get out of danger then deceased was negligent because he undertook to walk across the bridge; that if there were places (as the evidence conclusively shows) where he could have gotten out of harm's way, then his duty was to have done so.

That the bridge was reasonably safe for travel is shown by the fact that it had been used for about

ten years by sometimes hundreds daily, without any person getting injured thereon. So Penso was not guilty of contributory negligence in using the bridge. While it was reasonably safe, it was not absolutely safe. If a train was operated at a reasonable rate of speed and reasonable warning of the approach of a train given, neither of which was done in this case, a person anywhere on the bridge could get to a place of safety. Penso would have made the distance from the last upright to the west platform under conditions of reasonable care on the part of the defendant. At the speed the car was being operated, and without warning in time, going at such speed, Penso couldn't make it, that's all.

In the case of *Great Northern Railway v. Thompson*, *supra*, this court said:

"The question of contributory negligence is a question of fact, to be passed upon by the jury whenever the undisputed facts are such that different minds might reasonably come to different conclusions as to the reasonableness and care of the injured party's conduct. If the evidence is such as to leave the mind in a state of doubt on the subject, the case should not be withdrawn from the jury. These principles are so well established as to require the citation of no authority. It may be added that the question whether or not the person injured is guilty

of contributory negligence may often depend upon a variety of considerations. The question is not always answerable by pointing to the fact that the injured party might have used a safe way. Whether a reasonably prudent person would have taken the safe way may depend upon the situation and the circumstances, the accessibility and the proximity of the safe way, the extent of the public travel on the chosen way, the frequency of the passage of trains over it, and alertness in looking for passing trains."

See also:

*Young v. Clark* (Utah), 50 Pac. 832.

This bridge had been prepared for public use, and had been used daily for over ten years. The deceased and Balabanas had crossed this bridge for years and had never encountered a train on the track. Witnesses for the defense testified to the practical safety of the bridge even while the train was being operated across it at a reasonable rate of speed. If the car had been operated with ordinary care, Penso would have gotten to a place of safety.

## VI.

### REQUESTED INSTRUCTION.

The defendant requested the court to instruct that as the testimony disclosed that the engine had a headlight burning, that the question whether the

bell was rung was immaterial, and that the jury could find no negligence based on the fact the bell was not rung. The court did instruct as follows:

“You will understand that if the deceased saw, or knew in any *way* that that car was coming, the failure to give a signal of the approach of the car would not be a proximate cause, because the only way in which failure to give a signal would be a proximate cause of the injury would be that if it had been given it would have warned the man of the approach of the car, but if he knew it, without a signal why it would not be necessary to warn him.” (R. p. 85).

In the case of *Young v. Clark*, (Utah), 50 Pac. 834, the court said:

“Just before the bridge was crossed, the train was running at a high rate of speed for such a locality. Failure to ring the bell or blow the whistle before crossing the bridge had a bearing upon the charge that the defendant ran its train recklessly, and as tending to show negligent conduct on the part of the defendant at a time when a person was seen upon its track. While the failure to ring the bell or sound the whistle was not a proximate cause of the injury, yet it was one of the means that could have been used by the engineer to warn the plaintiff of approaching danger from the time she was first observed upon the track.”

The fact that there was a headlight, at the speed at which this car was being operated, did not afford Penso a reasonable opportunity to escape. Had the bell been rung or the whistle blown before the car rounded the curve some three hundred feet away, Penso would have had a warning in time.

## VII.

### REQUESTED INSTRUCTION.

The requested instruction that the evidence showed that deceased for a long period of time prior to the accident had traveled in the morning over a bridge across the river at some distance from where the railroad bridge was operated, was a circumstance to be considered in determining whether defendant was guilty of contributory negligence, was properly refused.

There was no testimony that deceased had ever used any other bridge than the railroad bridge in going to and from his work. Neither was there any testimony showing that he could go to or from his work by any other way; or that, if he could, that any other way was practical. The instruction, assumed facts that were not shown by the evidence. The court was justified in refusing to give this instruction.

In the discussion of this instruction, the court will observe that counsel does not cite to any place in the record where there is any testimony that Penso had ever crossed any other bridge in going to or from his work. There was no evidence of another convenient and less dangerous way home.

In the case of *Young v. Clark*, (Utah), 50 Pac. 834, the court said:

“Defendants would be responsible for negligently injuring deceased through their active intervention. Even if she were a trespasser providing at the time of the accident she was in the exercise of ordinary care, and they knew of her presence in a dangerous situation, or *failing to exercise due care to discover her presence* in such a situation when circumstances existed which would put a person of average prudence upon inquiry, *her presence upon the premises would then be a mere condition*, and not a contributing cause.”

## VIII.

### REQUESTED INSTRUCTION.

Defendant requested the court to instruct that if the jury believed from the evidence that it was dangerous to undertake to cross over the bridge at the same time a car was crossing the same, and they believed that deceased knew, or by the exercise of

reasonable care should have known, that he would meet the motor car on the bridge, then the deceased would be guilty of such contributory negligence and assumption of risk that would defeat any recovery for plaintiffs.

In the first place, it was the theory of both plaintiffs and defendant that it was not dangerous to undertake to cross over the bridge at the same time a car was crossing the same. The defense offered many witnesses to show actual experiences of meeting the train on the bridge, both by the train crew and persons caught on the bridge.

In the second place, under the facts, it was a question for the jury to say whether it was sufficiently dangerous, even if deceased knew, or should have known, that he would meet the motor car or train on the bridge, to make him guilty of contributory negligence or assumption of risk. The court could not instruct the jury regardless of the extent of the danger that deceased would be guilty of contributory negligence if he had reason to expect a train was coming.

Then again, Balabanas testified that he had always accompanied Penso home from work, as they worked together, and that they had never encountered a car upon the bridge while they were cross-

ing. No witness was called on behalf of the defense to show they had ever been on the bridge when a car passed over.

Even if they had expected a car, under the evidence on behalf of the defense as to the ease with which the car could be operated across the bridge with persons thereon, it would have been a question for the jury, under all the circumstances, whether the deceased was guilty of contributory negligence or assumed the risk.

Counsel says it can not be said that a man would be using reasonable care and caution to undertake to cross over this bridge when he knows that in all probability he will meet a train thereon. Then there must have been hundreds of men who have passed over this bridge who were very careless, in the eyes of counsel, notwithstanding the evidence of, defendant's own witnesses and the persons in charge of the motor car, that it was customary to find persons on the bridge.

## IX.

### VERDICT.

Counsel contend that the verdict cannot stand because it was joint verdict. While they cite *Fogarty*

*v. Northern Pacific etc. Co.*, 74 Wash. 397, and *Gulf etc. Co. v. McGinnis*, 228 U. S. 173, they omitted to cite the cases of *Central Vermont R. Co. v. White*, 238 U. S. 506, 59 L. Ed. 1433, and the case of *Lebovitz v. Cogswell*, 83 Wash. 178, which completely explode the contention of counsel.

For the foregoing reasons we respectively submit that the cause should be affirmed.

Respectfully submitted,

F. L. MORGAN,

L. H. BREWER,

A. EMERSON CROSS,

Attorneys for Defendants in Error.

